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Issue Date: 18 November 2002

CASE NO.: 2002-LHC-806

OWCP NO.: 7-157858

IN THE MATTER OF

THOMAS C. ROUSE
Claimant

v.

INGALLS SHIPBUILDING, INC.
Employer

APPEARANCES:

Sue Esther Dulin, Esq.
For Claimant

Paul B. Howell, Esq.
For Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Thomas C. Rouse (Claimant) against Ingalls Shipbuilding, Inc. (Employer), self-insured. The formal hearing was conducted at Gulfport, Mississippi on July 18, 2002. Each party was represented by counsel, and each presented documentary evidence, examined and

cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-36 and Employer's Exhibits 1-29. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on August 18, 2000;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on August 18, 2000;
5. A Notice of Controversion was filed August 28, 2000
6. An informal conference was held on July 3, 2001;
7. The average weekly wage at the time of injury is disputed ;
8. Employer paid Claimant benefits including temporary total disability from August 22, 2000 until October 25, 2000, and November 1, 2000 until November 7, 2000 and January 31, 2001 until March 27, 2002 at $350.51 per week and temporary partial disability from March 28, 2002 and continuing at $188.36 per week.

Issues

The unresolved issues in this proceeding are:

1. Average Weekly Wage
2. Nature and Extent of Disability
3. Section 7 Medicals
4. Attorney's Fees, penalties, interest, costs

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[1]The parties were granted time post hearing to file briefs.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "TR. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Statement of the Evidence

Testimonial and Non-Medical Evidence

Thomas Rouse, age 29, completed the 11th grade at George County, Mississippi, High School, and attained his GED the following year. He is married and has two children, ages 9 and 3, and currently lives in Lucedale, Mississippi . Claimant had been hired at Ingalls Shipyard in 1995 as a insulator joiner and had progressed to shipfitter first class by the time of his injury. Claimant had also begun working part-time for Lowe's Building Supply six weeks before his injury.

Claimant testified at the formal hearing, that on August 18, 2000, he arrived for work at 7 am, for the beginning of his 8 hour shift. Approximately two hours later, Claimant was attempting to install a 1000 pound pipe, which was held in place by a crane. The installation required him to cut a hole through the steel deck and insert the pipe. Once the pipe was inserted, Claimant had to weld away the excess metal around the pipe to help it fit more tightly. When the pipe was sufficiently fitted, Claimant took a 12 lb. sledgehammer and hit the pipe to shift it into place. In an effort to shift the pipe, Claimant suddenly felt a pain in his mid-back and ribs that extended to his navel, essentially wrapping around his left side. Claimant described the pain as paralyzing, causing him to remain rooted to the ground for up to fifteen minutes. When he recovered sufficiently to move, he was taken to the infirmary, where Dr. Warfield took x-rays and prescribed pain medication, and restricted Claimant from work.

Claimant testified in his depositions that he was restricted from work for two and a half months, returning to light duty work at Ingalls towards the end of October 2000. Throughout this time, Claimant saw Dr. Ray, who had been chosen by Claimant after Dr. Groff felt that he needed an orthopedic specialist. He also saw Dr. Wiggins at the Employer's request. When Claimant returned to Ingalls he worked in the Bicycle Shop for the 90 days preceding his lay off on January 31, 2001. Claimant explained that some of the supervisors ride bicycles around the ship yard, and so it was Claimant's light duty job to keep the bicycles in repair; filling tires, oiling chains, and fixing wheels.

Claimant testified in his deposition, Employer's Exhibit 29, that he was informed that Ingalls could only keep him on light duty status for 90 days, after those three months of light duty work they could not find a spot for him and consequently laid him off (EX 29, p. 26). Claimant did not work from the time of his lay off in January 2001 until he was hired at Winn Dixie on May 13, 2002. During that time he received total disability compensation through March 27, 2002, at which time Claimant began receiving partial disability compensation. Claimant also saw a variety of doctors recommended by Dr. Ray either for treatment or in an effort to ascertain the efficacy of the proposed surgery. The doctors Claimant saw were Dr. Faircloth, Dr. West, Dr. Walsh, Dr. Yearwood, Dr. Peterson, and Dr. Fleet.

Following his lay off, Claimant testified that he continued to receive treatment for his back, and held out hope of being rehired at Ingalls in a light duty capacity (TR 63). Lowe's did not officially terminate Claimant until January 11, 2001, but between August 17, 2000, his last day of work, and January 11, 2001 he was unable to work because of the light duty lifting restrictions resulting from his injury. In Claimant's Exhibit 7, Lowe's management explained that Claimant was released with the understanding that since he was a good employee, he would be considered for reemployment, based on availablity when he was released to full-duty. Claimant earned $918.47 at Lowe's between July 9, 2000 and August 17, 2000.

On February 14, 2002, Dr. Ray opined that without the proposed surgery, Claimant was at Maximum Medical Improvement, and could begin to find light duty work. Shortly thereafter, Mr Sanders performed a labor market survey identifying suitable alternative employment for Claimant. Claimant also performed his own job search, finding a job at Winn Dixie in May 2002, where he has been working since.

Mr. Tommy Sanders, a vocational rehabilitation counselor in Gulfport, Mississippi, prepared a preliminary vocational assessment and labor market survey report dated March 21, 2002 (EX 27), which detailed several available jobs, including: auto parts deliveryman at Auto Zone ($6/hr for 40 hours per week), sales associate at Calagaz Photo in Mobile, Alabama ($6.25/hr for 40 hours per week), and desk clerk trainee at Schular Inn in Moss Point ($6/hr for 40 hours per week). Mr. Sanders felt that based on Claimant's age, education, prior work history, and medical restrictions that these were all within Claimant's physical limitations.

In his report of March 21, 2002, Mr Sanders also performed a retroactive labor market survey as of February 14, 2002, in which the jobs available within Mr. Rouse's limitations were identified as: gate guard with American Citadel ($7.50/hr for 40 hours per week), desk clerk at the Days Inn in Moss Point ($5.50/hr for 16-24 hours per week), and sales representative at Mississippi Press ($5.25/hr for 40 hours per week). Mr. Sanders added that Claimant was positive in his approach as it pertained to returning to work.

Claimant testified at the formal hearing, that he immediately followed up on Mr. Sanders letter of March 20, 2002. On May 13, 2002, Mr. Rouse found a job as a produce clerk at Winn-Dixie for $5.45/hr., for 30 hours per week. Mr. Rouse continues to look for full time employment at a higher wage.

Employer's Exhibit 26 is Mr. Tom Stewart's vocational rehabilitation report, dated April 4, 2002. Mr. Stewart met with Mr. Rouse on March 26, 2002 in Wiggins, Mississippi to discuss employment options. Claimant discussed the financial difficulties that might prevent him from pursuing training for lighter skilled jobs and stressed the need for immediate regular weekly wages. Mr. Stewart prepared his report with the understanding that Claimant could not be exposed to any overhead weighted work, and must have limited overhead non-weighted work, as well as a 40 pound floor to waist restriction, and limited bending. These limitations were based on Dr. Joseph Ray's report of February 14, 2002. Mr. Stewart remarked that there was a good feasability for success. Claimant was interested in developing a viable on the job training program with an interested employer, as well as verbalizing a desire to return to work as soon as possible. The main objective was to identify suitable vocational objectives.

In the follow up meeting with Claimant on April 25, 2002, Mr. Stewart noted that Employer had reduced the compensation benefits that Claimant was receiving based on Mr. Sanders report of suitable alternative employment. Mr. Stewart also contacted Lowe's, Home Depot and NYCO Security about job opportunities. NYCO already had Claimant's application, and the other two employers encouraged an application for either full or part-time work. Claimant completed an Individualized Rehabilitation Placement Plan and Job Search Plan and Agreement. In the final meeting with Claimant, on June 6, 2002, Mr. Stewart explained that initially the position at Winn Dixie had originally offered Claimant $7.00/hr, but later reduced the wage to $5.45/hr. Claimant was disappointed, but continued to

work at Winn Dixie while searching for other employment. It was also noted at Employer's Exhibit 26, page 8, that Claimant was fairly certain that he can obtain work without much problem.

Claimant's wages records from his employment at Ingalls are Claimant's Exhibit 6. From August 22, 1999 through August 13, 2000 Claimant earned $27,338.63, and worked 227 days. He was a 5-day a week worker. Employer's Exhibit 28 is evidence that Claimant began working at Winn-Dixie at a rate of 5.40/hr. on May 17, 2002, working 30 hours per week, having informed the manager of his physical restrictions.

Medical Evidence

Employer's Exhibit 16 is Dr. Gary Groff's records. Dr. Gary Groff, first saw Claimant on August 22, 2000. Claimant complained of substantial pain on his left side. Dr. Groff's impression was that Claimant suffered from costochondritis, and he removed Claimant from work indefinitely. He scheduled an x-ray and prescribed pain medication. The x-ray showed neither rib fractures nor acute pulmonary disease. Dr. Groff saw Claimant again on August 28, 2000. He assessed the pain as costochondritis of the left side, and recommend medication and physical therapy. Claimant attended physical therapy, and returned to Dr. Groff on September 11, 2000, recording no change and upheld the aforementioned recommendations. Claimant also continued with physical therapy in the interim, returning to Dr. Groff on September 26, 2000. At which time, Dr. Groff felt that Claimant needed a orthopedic specialist, and so Claimant was authorized to see Dr. Ray.

Employer's Exhibit 17 is Dr. Joseph B. Ray's records. Dr. Ray, Claimant's primary treating physician and an orthopedic surgeon, has seen Claimant consistently since October 9, 2000. Initially, Dr. Ray diagnosed Claimant with a costochondal injury to the left anterior lateral ribcage. He referred Claimant for aquatherapy and insisted on a nuclear bone scan, releasing Claimant to light duty work on October 10, 2000, with no bending, twisting or heavy lifting; only sedentary work. At the follow-up appointment on October 31, 2000, Claimant was removed form work until further notice.

On November 7, 2000 Dr. Ray noted the possible uptake seen in the nuclear bone scan, which indicated that the source of the pain might be either

thoracic/lumbar discogenic or osteogenic. He recommended a MRI to fully understand the process affecting the spine.[3] Dr. Ray characterized Claimant as a light duty worker, but Claimant explained that the walk to the bicycle shop from his parking place was too strenuous, and Dr. Ray explicitly addressed these concerns in his restrictions.

On November 22, 2000, Dr. Ray recorded that the MRI showed a diseased disc at level T11-12. He disagreed with the radiologist, Dr. Pennington, in noting that the discs were neither well maintained nor well hydrated, and that pathology did explain Mr. Rouse's pain. He recommended nerve blocks or epidural steroid injections with Dr. Walsh, as well as physical therapy with spine specialist Sharon Young. Dr. Ray broached the subject of a diskectomy if all else were to fail, reassuring Claimant that it would not be anytime soon. Claimant was continued on light duty.

On November 28, 2000, Claimant saw Sharon Young at the Mobile Spine and Rehabilitation Center, which specializes in mechanical assessment of musculoskeletal disorders. Ms.Young's report, Claimant's Exhibit 16, confirmed that based on the mechanical assessment, the T11-12 discs were involved. She reported that Claimant returned for a 24-hour lumbar extension, which revealed that no position or movement was found to centralize or decrease Claimant's pain, and consequently, she felt that there was no mechanical therapy that could be of use. Claimant explained in his deposition that Ms. Young felt that the his back had to be fixed before the physical therapy could have any benefit.

On December 6, 2000, Dr. Ray and Claimant again discussed the possibility of surgery, after they continued to pursue conservative treatment. Dr. Ray noted that Ms. Young had agreed with his diagnosis of discogenic source of pain at T11-12, as well as commenting upon the MRI which had shown a herniated nucleus pulposus at T11-12. Dr. Ray recommended Dr. Walsh for pain control measures, as well as the usefulness of muscle stimulation if it would be approved. When Claimant returned on December 18, 2000, Dr. Ray noticed that Claimant had aggravated his condition at work, and therefore urged further pain control measures with Dr. Walsh. Dr. Ray explained that although Claimant's condition had

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[3]The lumbar and thoracic MRI was conducted on November 20, 2000 by Dr. Michael Pennington.

improved 60% since the worse pain, he hoped to improve his condition at least another 20%, allowing Claimant to return to regular duty work.

On January 10, 2001 Dr. Ray referred Claimant to Dr. William Shepard Fleet for confirmation of a discogenic source of pain. Dr. Ray also recorded that Claimant underwent muscle stimulation for the first time, and reurged Dr. Walsh's injections, which had yet to be performed, for the continuing radiating pain.

Employer's Exhibit 21 is Dr. William Fleet's records. Dr. William Shepard Fleet, a neurologist, was recommended by Dr. Ray for confirmation of discogenic source of pain or irritated type of radiculopathy. On January 19, 2001, the initial visit, Claimant described his pain as being constant, however considerably reduced since the accident, from the most intense pain rating 10 out of 10, to a burning or aching 3-4. Dr. Fleet felt that Claimant was probably suffering from a thoracic radiculitis due to a thoracic herniated disk. Dr. Fleet advised waiting to determine the value of Dr. Walsh's thoracic epidural injections, but surmised that, depending on Claimant's response, it could come to needing a surgical procedure with Dr. Ray.

Dr. Fleet saw Claimant again on February 2, 2001. At this visit, he changed Claimant's medication and noted that the injections and Carbatrol and Celebrex only helped to reduce the pain minimally. On February 16, 2001, Claimant returned and reported that Dr. Walsh's injections had only served to lessen the pain 20-25%. Dr. Fleet recorded that Claimant continued with a thoracic radiculitis, and recommended medicating the pain. Claimant testified in his deposition that he understood that Dr. Fleet agreed with Dr. Ray that the surgery should be performed (EX 29, p.21).

Claimant continued to see Dr. Ray for monthly follow-up examinations and medication. There were no notes from the January 30, 2001 appointment, but simply a continuation of light duty restrictions and a prescription for Darvocet. On February 28, 2001 Dr. Ray commented that Claimant had seen Dr. Faircloth, a neurosurgeon, who did not feel that T11-12 was the source of pain. In response, Dr. Ray requested that a diskography be performed. Claimant also reported that the pain blocks had provided 20% relief, which Dr. Ray remarked was not effective enough to continue such treatment.

On April 27, 2001, Dr. Ray again reviewed the findings of the other medical professionals who had examined Claimant, noting that Dr. Faircloth did not offer a specific diagnosis or treatment. Dr. Ray localized Claimant again at T11-12, and ascertained that Claimant was willing to endure a provactive diskography. Again he recommended the surgery and continued medication.

On May 1, 2001, Dr. Ray explained that he would like to perform the provocative diskogram but only if allowed to perform the accompanying surgery if the diskogram indicated that it was necessary. Dr. Ray included this stipulation to avoid having to surgically intervene twice, putting the Claimant in what Dr. Ray explained as "double jeopardy."

Dr. Ray saw Clamant for an appointment on June 13, 2001whic again recommended the surgery and remarked that Claimant's Toradol was administered by his mother-in-law who is a licensed nurse. Then On July 13, 2001, Dr. Ray commented that neither Dr. Faircloth, nor Dr. West, who had evaluated Claimant at the Employer's request, had agreed with the proposed surgery. Dr. Ray therefore recommended that Claimant see Dr. Yearwood, an anaesthesiologist who was very proficient with small needles, for an evlauation and diagnostic procedure in the localized thoracic area.

Employer's Exhibit 24 is Dr. Yearwood's records. Dr. Thomas L. Yearwood, a pain therapist and board certified anethesiologist, saw Claimant on August 10, 2001 at the behest of Dr. Ray. After a thorough evaluation, Dr. Yearwood diagnosed a thoracic radiculopathy and degenerative disk disease. He read the MRI as showing a loss of disk height at T11-12, as well as a apparent subligamentous herniation underneath the anterior spinal ligament.

On August 10, 2001, Dr. Yearwood performed the provocative diskography, in an effort to help understand the pathophysiology of the intervebral disk in preparation for a possible percutaneous laser-assisted spinal endosopic disk decompression. Based on the results of the procedure, he felt that the Claimant failed to demonstrate any significant component of primary diskogenic pain. The results did correspond with the MRI, in that there was a extruded disk anteriorly under the anterior spinal ligament. He surmised that Claimant could be experiencing some degree of iliopsoas muscle and paraspinous muscle irritation from the extruded disk. In conclusion, he felt that the diskectomy may not be of any benefit in relieving

the discomfort in the left flank. Instead, he recommended injections at the T10-11-12 levels.

On August 15, 2001, Dr. Ray saw Claimant again, and after reviewing the diskogram produced by Dr. Yearwood, as well as the post-diskogram CT[4], he felt that Claimant had a annular tear at T11-12 which was causing pain. Dr. Ray disagreed with Dr. Yearwood's assessment, especially as to the long term treatment that Dr. Yearwood recommended. He felt it was futile. Dr. Ray reurged the need for surgery, as well as nerve blocks if Claimant desired that type of treatment. On September 17, 2001 Claimant was fitted for an orthodic device, a backbrace, to stabilize the thoraic and lumbar spines.

Dr. Yearwood saw Claimant again on October 8, 2001(EX 24). His impression was that Claimant suffered from a spondylosis and intervertebral disc displacement with myofascial pain syndrome. Dr. Yearwood noted that Claimant did not benefit from corticoid steroid injections. He recommended physical therapy, conservative injection therapy, and a neuromuscular stimulation to reduce muscle spasms and improve normal muscle function, as well as a psychiatric pain evaluation. He was concerned with secondary gain issues for Claimant, and recommended that a Functional Capacity Evaluation be performed to ascertain Claimant's abilities.

October 17, 2001 Dr. Ray noted that Claimant's complaints were the same, and again recommended the surgery with laser treatment. He commented that a Functional Capacity Evaluation would be fine. Dr. Ray explained his findings from the diskogram, while remarking that Dr. Yearwood's findings appeared incomplete, in so far as there was a gap in the body of the note and no conclusory statement. Dr. Ray again noted that he felt Claimant had a HNP at T11-12. Dr. Ray continued to recommend the endoscopic surgery, as well as approving a Functional Capacity Evaluation.

On November 19, 2001, Claimant complaints were the same. Dr. Ray had reviewed Dr. West's records, the doctor whom Employer had requested surgical consult, which rejected the proposed minimally invasive surgery, but referred Claimant to Dr. Bendt Peterson for a second opinion, with which Dr. Ray agreed.

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[4] Dr. Daniel Reimer performed the post discogrpahy CT scan

Once again, Dr. Ray proposed the surgery, but felt that in the meantime, a Functional Capacity Evaluation could be performed by Stephanie Harle at Pro-Health to determine Claimant's abilities.

On January 7, 2002, Claimant returned for monthly visits with no significant changes in his condition, and continued to complain of the same pain. Dr. Ray noted that Claimant also had scoliosis which involved the thoracolumbar area at L1-2. Dr. Ray addressed Dr. Peterson's examination, and agreed that if there was no planned surgery, then further injections might be warranted; however, in this case there was more definitive treatment which could be more curative. He again urged performing endoscopic HO-YAG radiofrequency treatment. Dr. Ray requested another thoracic and lumbar MRI to assess any additional changes within the year.

Claimant's Exhibit 26 is the record of the Functional Capacity Evaluation performed by Stephanie Harle, P.T., on February 6, 2002. She noted a consistent effort, appropriate pain behavior, a cooperative attitude, and a willingness to work to his maximum abilities. She concluded that his ability to perform heavy physical labor was restricted, being able to lift at most less than 50lbs. The significant deficits noted were 1) limited tolerance for material handling greater than light-medium level, 2) decreased ability to push and pull dynamically, 3) decreased tolerance for maintaining positions if hip and trunk flexion, 4) decreased tolerance for trunk rotation and 5) limited tolerance for vertical climbing. Ms. Harle felt that there was a potential to improve his capacity with use of improved body mechanics and strengthening/conditioning.

On February 14, 2002 Dr. Ray opined that if the surgery he recommended was refused, then Claimant had reached Maximum Medical Improvement, with a 33% impairment to the body as a whole. Dr. Ray had critically evaluated the MRI performed by Dr. Oakes, remarking that Dr. Oakes had counted the vertebrae incorrectly, resulting in an inconsistent MRI. Dr. Ray also addressed Dr. Yearwood's incompatible opinion, explaining that in light of the post-discogram CT scan, Claimant did show an annular tear that should be treated with a selective endoscopic diskectomy at T11-12 on the left. He also recommended a month of work-hardening and additional conditioning.

On March 21, 2002, the diagnosis remained a herniated nucleus pulposus and annular tear at T11-12, which enabled Claimant to work at a light-medium job, with

restrictions as indicated by the Functional Capacity Evaluator, Stephanie Harle. Claimant continued to see Dr. Ray monthly through the time of the formal hearing.

Employer's Exhibit 18 is Dr. Chris Wiggins' records. Dr. Chris Wiggins, an orthopedic specialist, first saw Claimant on October 11, 2000, for a second opinion at the request of Employer. His impression stated that Claimant had costochondal separations at 6,7,8. He saw Claimant a week later on October 17, 2000, and observed that Claimant had made no progress with the physical therapy, which caused him some concern. Dr. Wiggins recommended another week of therapy, a bone scan, and restricted work.[5]

On October 24, 2000, Dr. Wiggins saw Claimant again, and was unable to find a physiological source of pain for the popping and discomfort of which Claimant complained. Dr. Wiggins returned Claimant to light duty work as of October 26, 2000, with no lifting heavier than 10 lbs., and no ladder climbing. He prescribed Darvocet and Anaprox for the pain (EX 18). After examining the bone scan report, Dr. Wiggins remarked that he saw increased activity at the T8 level, but contrary to the findings of the radiologist, did not think it was compatible with a fracture.

Dr. Wiggins' report dated November 15, 2000 ruled out costochondal separation, based on the CT of the chest performed by Dr. Michael Horowitz, a cardiothoracic surgeon (EX18). Dr. Horowitz, who examined Claimant on November 1 and 15, 2000, believed there was a continuing intercostal neuritis, which could respond to injections from a pain doctor (EX 19). However, Dr. Horowitz was uncertain of the etiology of Claimant's chest wall symptoms, noting that he was consistently tender at T7-9. Dr. Wiggins, as well as Dr. Horowitz, remarked that since Claimant had been seeing Dr. Ray, an orthopedic surgeon in Mobile, he should continue treating Claimant, and arrange for the necessary CT scan, serum and urine studies.

Employer's Exhibit 20 is Dr. David Walsh's records. Dr. David G. Walsh, a pain specialist and surgeon, first saw Claimant on January 17, 2001. Dr. Ray had

[5]The bone scan was performed by Dr. William Ehlert at the Singing River Hospital on October 23, 2000. He noted a mildly abnormal bone scan mid dorsal spine, which suggested a minimal fracture of the T8 vertebral body. (CX 23)

recommended that Claimant see Dr. Walsh for injections of pain medication. He opined that although most of the physical examination showed normal responses, Claimant was very tender in the thoracic lower spine. It was in the T11-12 area that Claimant experienced intense pain when the doctor touched his spine. During this visit, Dr. Walsh injected Claimant at the T11-12 area with a combination of Marcaine, epinephrine, and Depo-Medrol. Dr. Walsh also prescribed Lortab 7.5 mg, #40 with a refill.

Employer's Exhibit 22 is Dr. Faircloth's records. Dr. W. Brent Faircloth, a neurosurgeon, saw Claimant on February 20, 2001. Dr. Faircloth reviewed the MRI of the thoracic spine and noted no evidence of neural impingement. It was his opinion that Claimant suffered from a paraspinous muscle spasm. He recommended a psychiatric evaluation and conservative management of symptoms, instead of surgery.

Employer's Exhibit 23 is Dr. West's records. Dr. James L. West, an orthopedic specialist, saw Claimant on June 8, 2001. Dr. West was another surgical consult in an effort to determine Claimant's need for surgery. After examining Claimant, Dr. West found that the surgery recommended by Dr. Ray, a percutaneous nucleotomy, would have a 50/50 chance of helping, and should only be a last resort, with no implied guarantees. Dr. West was also concerned with the safety of the procedure as well as FDA approval. Dr. West stated that if Claimant decided against the surgery, he would recommend a three week work hardening program, declare MMI and a 5% body as a whole impairment. However, if Claimant chose to undergo surgery, then the MMI and impairment valuation could not be made. On November 7, 2001, Claimant returned to Dr. West to further discuss the aforementioned surgery. He reiterated his opinion that surgery should not be considered, but encouraged Claimant to get a second opinion.

Employer's Exhibit 25 is Dr. Peterson's records. Dr. Bendt Peterson, an orthopedic surgeon, recommended by Dr. West as able to provide the second opinion and if necessary the desired surgical procedure (TR 41). Dr. Peterson saw Claimant on December 20, 2001. After an examination, Dr. Peterson diagnosed Claimant with a thoracic spondylosis with radiculitis. Dr. Peterson discussed the proposed surgery with Mr. Rouse, and explained the efficacy might be 50/50 or less, and therefore did not encourage the surgery. Dr. Peterson felt that Claimant's

condition had plateaued and MMI could be considered with a 5% whole body permanent impairment.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a

decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated that an injury/accident occurred on August 18, 2000 during the course and scope of Claimant's employment (JX 1). I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant clearly injured his back while hammering the pipe. The extent, duration and disabling effects of that injury, however, are at issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching Maximum Medical Improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

Dr. Ray, Claimant's treating physician, has consistently recommended that Claimant undergo the diskectomy. Since he treated Claimant throughout the various forms of conservative treatment, including nerve blocks, muscle stimulation, pain medication, and physical therapy, I find in this instance that the opinion of the treating physician should be entitled to greater weight than other experts unless there is a valid reason to discount it. *Auton v. Eastern Gas & Fuel Corporation*, 10 B.R.B.S. 255 (1979). In this case there is no reason to discount Dr. Ray's opinion. The treating physician had the benefit of examining Claimant monthly over the

course of his two year treatment, as well as reviewing all the data generated by other physicians.

Dr. Ray has provided cogent and critical responses to each of the physicians who advised against the surgery, and fully explained the procedure and its risks to Claimant. Claimant testified that he would like to have the surgery, instead of continuing to live with the permanent impairment. Therefore, there is medical treatment available which could improve Claimant's condition. Even if there is only a 50% chance of success, I am inclined, in light of Dr. Ray's status as the treating physician, his thoughtful critique of other physicians' evaluations, as well as Claimant's desire to have the surgery, to therefore authorize it. Consequently since Claimant has not received the full benefit of medical treatment, I find he is not at maximum medical improvement, and his disability is temporary.

Dr. Ray, Claimant's treating physician throughout his injury, has consistently recommended surgery, and anticipates that it could significantly relieve the chronic pain that Claimant experiences. Dr. Ray's opinions are based on his examinations of Claimant, as well as the MRI and CT tests, and Dr. Yearwood's discogram.

Although Employer argues that Drs. Yearwood, Peterson, West, and Faircloth, did not see the need for surgery, their recommendations and the basis for their opinions are not so easily simplified. Although Dr. Yearwood remarked that he did not feel that the surgery would have any benefit, he was concerned with secondary gain issues, and therefore might not have fully appreciated either the pain, or Claimant's efforts to treat the pain through conservative methods. Dr. West and Dr. Peterson agreed that the surgery could have a 50/50 chance of success, although in the end they did not recommend it themselves. Dr. Faircloth saw Claimant only once, and did not address, or did not take into account, the ineffectiveness of the conservative treatment that Claimant had already undergone. Furthermore, as explained above, the opinion of Dr. Ray is given more weight than those of the other doctors, by virtue of the length of time he treated Claimant, as well as his thoughtful critique of the varying opinions and findings of other physicians.

Consequently, although Claimant was seen by a variety of other doctors, most of whom discouraged the surgery, there is no evidence that any one of the doctors that examined Claimant is more professionally qualified or credible than any of the others. In fact, since some of those same doctors only saw Claimant briefly as

oppose to having treated Claimant monthly for a period of two years, I am less inclined to rely on their opinions. Moreover, Dr. Ray took the opinions of the other physicians into consideration, and although he maintained his original recommendation, that Claimant should have the surgical procedure, he did carefully consider the findings of other doctors. As a result, I choose to credit the opinion of Claimant's treating physician, as well as Claimant's desire to have the surgery to improve the possibility of returning to more lucrative employment.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

Claimant has shown, and Employer acknowledges, that he is unable to return to his former employment. The restrictions placed on Claimant from the date of his injury and continuing, indicated that he was unable to return to his former employment as a shipfitter. Dr. Groff removed Claimant from work on August 22, 2000, and he was released to light duty by Dr. Ray on October 11, 2000. In light of Sharon Young and Stephanie Harle's evaluations that show Claimant as having significant lifting restrictions, Claimant remains unable to return to the heavy weight lifting requirements of a shipfitter. Claimant was able to work in a light duty position at Ingalls until January 31, 2001, when he was included in a general lay-off, but since the Employer's withdrawal of light duty employment was related to Claimant's disability, they continue to shoulder the burden of establishing suitable alternative employment.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if its within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). Where the employer withdraws its light duty job, as Employer here did on January 31, 2001, when Claimant was laid off, the burden of establishing subsequent, suitable alternative employment remains with the employer. *Mendez v. National Steel and Shipbuilding Co.*, 21 BRBS 22, 24(1988).

It is my finding that Employer established suitable alternative employment as of February 14, 2002. Mr. Sander's labor market survey offered Claimant some job possibilities, albeit at a lower rate of pay than his former employment. The employer is not required to act as an employment agency for the claimant. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). Employer identified jobs that were actually available within the local community that took into consideration Claimant's age, education, work experience, and physical restrictions. According to Dr. Peterson, as well as Claimant's own testimony, Claimant is capable of performing the gate guard position, the sales representative with Mississippi Press, or the desk clerk at Days Inn. Claimant's desire to earn a higher wage, as well as his strong work ethic, make it very likely that he could earn the highest wage possible, which was the security guard position at $7.50/hr.

In sum, Claimant testified at the formal hearing that he is capable of working more hours at a higher wage than he is presently doing at Winn Dixie (TR 67). Employer has presented evidence that Dr. Ray released Claimant to light duty work on February 14, 2002, and Employer has identified suitable alternative employment as of that date. Therefore, Claimant's disability is partial as of February 14, 2001.

The residual wage earning capacity can be determined by looking at the Claimant's earning potential based on the jobs available. Claimant's desire to work, as well as the gate guard position available in February 2002 for $7.50, indicates that Claimant has a wage earning capacity of approximately $7.50/hr. Although his actual wages are only $5.45, Claimant testified he anticipates being able to find higher paying employment on a full time basis. Claimant's compensation benefits should reflect his wage earning *potential*. Claimant's earning capacity, based on the

Claimant's own testimony, as well as the proffered alternative employment, is $300.00/week.[6]

Mindful, however, of the fairness concerns expressed in *Richardson v. General Dynamics Corp.*, 23 BRBS 330 (1990), Claimant's wages are adjusted to reflect their value at the time of August 2000 injury. The National Average Weekly Wage (NAWW) for August 2000 was $450.64, and the NAWW for Februrary 2002 was $483.04. Thus, the 1998 NAWW was approximately 93 % of the 2002 NAWW. The wages must be adjusted accordingly. The correction percentage multiplied by the average weekly wage of the newly identified weekly earning potential is (93% x $300.00) $279.00 Based on these adjustments, I find that Claimant has a residual wage earning capacity of $279.00.

In sum, Claimant was temporarily totally disabled from the date of his lay off on January 31, 2001 until Employer identified suitable alternative employment on February 14, 2002. Thereafter and continuing, Claimant is entitled to a temporary partial disability award based on a residual wage earning capacity of $279.00.[7]

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee

[6] Average hourly wage $7.50 x 40 hrs = $300.00.

[7] At the hearing Employer acknowledged that Claimant was also temporarily totally disabled from August 22, 2000 until October 25, 2000, and November 1, 2000 until November 7, 2000.

worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply.

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a "catch-all" to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under the Act is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997).

In this instance, Claimant urges that 10(c) be used to calculate the average weekly wage, due to the fact that using 10(a) would not take his earnings at Lowe's into consideration. Employer, on the other hand, argues that 10(a) should be used because Claimant's employment at Lowe's was non-maritime and therefore should not be represented at all in the calculation of the average weekly wage.

I disagree with Employer. I find that the Act, and accompanying case law, urges me to look beyond the *type* of employment in determining the individual's earnings capacity at the time of his injury. The fact that Claimant's work at Ingalls was maritime and his work at Lowe's was non-maritime is not relevant for the

purpose of calculating the effect his injury had on his ability to earn wages. Consequently, in order to reasonably and fairly determine Claimant ability to earn wages at the time of injury, I will calculate the wage using section 10(c).

Mr. Rouse was employed with Ingalls for the 52 weeks preceding his injury. Claimant had also taken a second job at Lowe's six weeks prior to his injury. The accident which caused Claimant's injury is responsible not only for the wages lost because Claimant can not return to Ingalls, but also prohibits Claimant from returning to his job at Lowe's. There is ample case law that holds that wages in all jobs held at the time of injury are included in the determination of the average weekly wage. Especially, in situations where the claimant's ability to earn wages in both the job in which he was injured, and the "second" job, were affected by his work-related injury. *Liberty Mutual Insurance Company v. Britton,* 98 U.S.App.D.C. 208, 211, 233 F.2d 699, 702, *cert. denied,* 352 U.S. 918, 77 S.Ct. 214, 1 L.Ed.2d 122 (1956); *Lawson v. Atlantic & Gulf Grain Stevedore Co.*, 6 BRBS 770, 777(1977); *Stutz v. Independent Stevedore Co.*, 3 BRBS 72 (1975).

Section 10 (c) allows considerable latitude in determining a reasonable approximation of Claimant's wage earning capacity. The calculations I have chosen to use, in my opinion, adequately and fairly represent Claimant's average weekly wage at the time of injury, and are as follows:

Ingalls

8/22/99-8/13/00 (52 weeks preceding injury) $27, 338.63
$27, 338.63 ÷52 weeks = **$525.74 average weekly wage at Ingalls**

Lowes

7/9/00-8/17/00 (6 weeks) $918.47
$918.47 ÷ 6weeks = **$153.08 average weekly wage at Lowe's**

Therefore, it is my finding that Claimant's total average weekly wage at the time of his injury equaled $678.82.[8]

[8] $525.74 + $153.08 = $678.82

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curium) *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

All the doctors visits, tests, treatments, and medications had been paid in full by Employer at the time of the formal hearing. There were no outstanding medical bills. However, Claimant has requested that the percutaneous laser-assisted spinal endosopic disk decompression surgery, recommended by Dr. Ray, be an authorized medical expense according to the Act. For the reasons previously discussed, I accept Dr. Ray's opinion, and I find Claimant should be allowed to elect the surgical option to further improve his condition.

Since Dr. Ray states that there is a benefit in having the proposed surgery, and Drs. West and Peterson opined that Claimant has a 50/50 chance of success, it is therefore necessary and reasonable, and Claimant is allowed to pursue the surgery at Employer's expense.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on August 22, 2000, 4 days after injury. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from August 22, 2000 until October 25, 2000, and November 1, 2000 until November 7, 2000, and January 31, 2000 until February 14, 2002, the date of suitable alternative employment, based on an average weekly wage of $678.82;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from February 14, 2002 and continuing, based on the difference between the average weekly wage of $678.82 and the adjusted residual wage earning capacity of $279.00;

(3) Employer/Carrier shall pay for all reasonable and necessary medical expenses, resulting from Claimant's injuries of August 18, 2000, including the surgery recomended by Dr. Ray;

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a

copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam